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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

JEANNE B. SCHMIER,
Petitioner,

VS.

DAVID D. JENNINGS and CRAIG JENNINGS,

Respondents.

On Petition for A Writ of Certiorari
To The Court of Appeal of the State of California
Second Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

California Rules of Court 976, 977 and 978 establish a system of *selective* publication of the opinions of the California Courts of Appeal. This system has no standard requiring publication of any opinion. Under this system, only a small percentage of appellate opinions are published in the California Official Reports. An opinion which is not so published may not be cited, or relied upon, as precedent by any court at any time in the future, even by the very court that rendered the opinion, except in matters relating to the same litigants.

In instances where a Court of Appeal designates its opinion "Not To Be Published In The Official Reports" and that opinion is thus not published in the Official Reports, and where that opinion both fails to follow established precedent and also uses novel rules of law to decide the case, does this system of selective publication violate the Equal Protection Clause of the United States Constitution?

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J. EISENBERG, E. HORVITZ & H. WEINER, CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS §13.18 (1996) — 23

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Nick News (Channel 36, San Francisco Area, television rebroadcast, Dec. 27, 1997) 15

Preface, 5 U.S. [1 Cranch] (1801) 14, 15, 16

W. Reynolds & W. Richman, *The Non Precedential Precedent--Limited Publication and No Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) 15

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IN THE SUPREME COURT of the UNITED STATES

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Petitioner,

v.

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Respondents.

On Petition For A Writ Of Certiorari
To The Court of Appeal of the State of California,
Second Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

Jeanne B. Schmier respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Two.

OPINIONS BELOW

The opinion of the Court of Appeal marked "Not To Be Published In The Official Reports" (App. 1a-14a), is unreported. Petitioner's Petition for Rehearing to the Court of Appeal, as well as a Petition for Rehearing by Respondents, was denied. App. 15a, 16a. Petitioner requested that the opinion be certified for publication in the Official Reports of the State of California, but the Court of Appeal recommended to the California Supreme Court that the request be denied. App. 17a-18a. The California Supreme Court subsequently denied Petitioner's Petition for Review of the Court of Appeal's judgment and her request for publication. App. 19a.

JURISDICTION

The opinion of the California Court of Appeal was filed on July 28, 1997. The Court of Appeal denied Petitioner's timely petition for rehearing on August 27, 1997. The California Supreme Court denied Petitioner's timely Petition for Review of the Court of Appeal's judgment and her request for publication of the Court of Appeal's judgment on October 15, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

The question presented was preserved in the California courts at the earliest opportunity. It did not arise until Petitioner received the Court of Appeal's opinion. Petitioner thereupon sought rehearing, arguing that the Court of Appeal had erred for numerous reasons and that its decision resulted in fundamental unfairness and a violation of the equal protection provisions of both the California and United States Constitutions. Petitioner sought publication of the opinion pursuant to the California Rules of Court.

In her Petition for Review to the California Supreme Court, Petitioner likewise argued that the result

and the Court of Appeal's non-publication of its opinion violated equal protection principles and guarantees.

CONSTITUTIONAL AND CALIFORNIA RULES OF COURT PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

2. Rule 976 of the California Rules of Court provides, in pertinent part:

> "**(a) [Supreme Court]** All opinions of the Supreme Court shall be published in the Official Reports.
>
> "**(b) [Standards for publication of opinions of other courts]** No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:
>
> "(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
>
> "(2) resolves or creates an apparent conflict in the law;
>
> "(3) involves a legal issue of continuing public interest; or
>
> "(4) makes a significant contribution of legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

"(c) **[Publication procedure]**

"(1) [*Courts of Appeal and appellate departments*] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

"(2) [*Supreme Court*] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect."

3. Rule 977 of the California Rules of Court provides, in pertinent part:

"**(a) [Unpublished opinions]** An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

"**(b) [Exceptions]** Such an opinion may be cited or relied upon:

"(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

"(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding."

4. Rule 978 of the California Rules of Court provides, in pertinent part:

> "(a) **[Request procedure; action by court rendering opinion]** A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by a letter stating the nature of the person's interest and stating concisely why the opinion meets one or more of the publication standards. The request shall be accompanied by proof of its service on each party to the action or proceeding in the Court of Appeal. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication.
>
> "(b) **[Action by Supreme Court]** When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The court shall send notice of its action to the transmitting court, each party, and any person who has requested publication."

STATEMENT OF THE CASE

The facts of the case are essentially undisputed as between Petitioner and Respondent but were misstated by

the California Court of Appeal. Nevertheless, the facts as stated in that court's opinion described a matter that still should have been easy to resolve by application of basic principles of contract law.

In 1981, Petitioner purchased a parcel of land, Lot 10, in Los Angeles, and she later converted a small warehouse on it to a four-story office building. Under City of Los Angeles ordinances, she was required to provide twenty-eight parking spaces for use by the building's tenants in order to obtain a Certificate of Occupancy and rent the building for its intended purpose. Lot 10, with the office building, could not provide those spaces. In order to meet the City's requirements, she therefore purchased an additional lot, Lot 25, in order to accommodate her plans for parking.

Respondent David Jennings, however, wanted to develop property in the same area, and Petitioner's purchase of Lot 25 blocked his plans. Respondent therefore contacted Petitioner and proposed to her that they enter into an agreement under which she would delay construction of her planned parking structure on Lot 25. In return, he would attempt to find her an alternative lot for her parking that would meet the City's parking requirements for her Lot 10. If he were successful, the alternative lot would be exchanged for Petitioner's Lot 25. The alternative lot would then serve as Petitioner's parking site, and it would allow her to satisfy the City's requirements regarding the Certificate of Occupancy for her office building on Lot 10; at the same time, it would let Respondent have Lot 25 as a necessary and integral part of his proposed development.

In the meantime, Respondent suggested he would place parking restrictions on yet another lot—Lot 23. Respondent proposed that while he searched for the lot to be exchanged, he would burden his Lot 23 with parking covenants for Petitioner's benefit, and thus on an interim basis Respondent's Lot 23 and Petitioner's Lot 25 would

provide the twenty-eight parking spaces necessary for Petitioner to use her building on Lot 10.

After discussions, Petitioner and Respondent entered into such an agreement. The Agreement generally specified that, if Respondent were successful, he could give notice to Petitioner that he was exercising his option to exchange, and Respondent and Petitioner would then exchange lots. At the end of the process, Respondent would have Lot 25 and could proceed with his development plans, the interim parking covenants imposed on Respondent's Lot 23 for Petitioner's benefit would be removed, and Petitioner would have the exchanged lot for her permanent parking. Respondent subsequently purchased Lot 26 as the proposed lot to be exchanged with Petitioner for her Lot 25, and he then gave notice to Petitioner exercising his option.

The Agreement specified—and the trial court found—that, as part of the exchange of lots, Respondent was required to deliver Lot 26 to Petitioner "free and clear of encumbrances and structures and . . . graded and paved" unless Petitioner waived the requirement for paving. Respondent did not do so. Lot 26 had a building located on it at the time Respondent gave his notice to Petitioner. Respondent conceded in his testimony that "under the agreement . . . it was [his] obligation to remove that structure" and that he "was obliged to demolish the building." The trial court concluded, and it is undisputed, that Respondent "never cleared the designated lot as required by the agreement." And, he never tendered a deed for Lot 26 to Petitioner.

For various reasons, Petitioner and Respondent then could not reach further agreement, and Respondent commenced this litigation. After a bench trial, the trial court held that Petitioner had breached the Agreement. *Its ruling explicitly rested on its interpretation of a single sentence in the Agreement and it expressly refused to read the contract as a whole.* As it orally explained, it interpreted this single sentence of the Agreement as compelling Petitioner to take

"the first affirmative act" and "to take steps to eliminate the parking covenants" on Lot 23. The court rejected objections from Petitioner that this interpretation ignored the remainder of the Agreement and violated long-established California law that requires every contract to be read as a whole.

The Court of Appeal affirmed the judgment. App. 1a-14a. Petitions for rehearing by both Petitioner and Respondent were denied without opinion. App. 15a, 16a. The California Supreme Court denied Petitioner's Petition for Review, as well as her request that the Court of Appeal's opinion be published in the California Official Reports. App. 19a.

REASONS FOR GRANTING THE WRIT

The Court Of Appeal Departed From Long-Settled Law And Developed New Rules That It Applied Only To Petitioner.

As already noted, the trial court concluded that Petitioner breached the option contract with Respondent based *only* on a single provision of the contract which it interpreted, while expressly refusing to consider the remainder of the contract, as compelling Petitioner unilaterally to take certain actions. When she did not do so, so reasoned the trial court, she breached the contract.

The California Court of Appeal never responded to Petitioner's arguments regarding the trial court's error in that conclusion.[1] Instead, its decision struck out into

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[1]Indeed, it is difficult to understand how the Court of Appeal could have upheld the trial court, since its reasoning violated a rule of California law that could not possibly be more well-established: in fact, the rule on which Petitioner relied for her appeal was first codified in 1872, and has remained unchanged since then. CAL. CIV. CODE §1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"). California case law has never varied from that principle. *E.g.*,

(continued...)

uncharted waters and relied on its own newly minted and announced theory of the case. Its opinion includes no citation supporting any authority to deviate from established law, and none has been found.

However, it is not the failure of the court to follow binding precedent, nor its creation of novel law, nor the resultant fundamental unfairness and unequal treatment of Petitioner that is the basis of this Petition. Rather, Petitioner objects that the court, by marking its opinion "Not To Be Published In The Official Reports" ruled that its changes to California law do not apply in all similar instances, but instead apply *only to her*.

First, the Court of Appeal affirmed the conclusion that Petitioner breached the contract, but only on its own completely new theory: that Petitioner had breached the Agreement by failing to timely open an escrow for the exchange of lots. App. 12a. This new theory was never raised by Respondent in the trial court, and the trial court not once mentioned it. The facts necessary to establish that theory were never argued to the trial court, they are conflicting and no findings on that theory were made. The theory was never raised in briefing to the Court of Appeal. It was advanced by the Court of Appeal itself for the first time *only in its opinion*.

This use by the Court of Appeal of an entirely new and untried theory of the case to conclude that Petitioner breached the Agreement between the parties violates the California Supreme Court's controlling admonition that

> "[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new

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[1](...continued)
New York Life Ins. Co. v. Hollender, 38 Cal. 2d 73, 81 (1951) ("the entire contract is to be construed together for the purpose of giving force and effect to each clause"); *County of Marin v. Assessment Appeals Bd.*, 64 Cal. App. 3d 319, 325 (1976) ("the contract must be construed as a whole").

> theory depends on controverted factual questions whose relevance thereto was not made to appear at trial." (*Bogacki v. Board of Supervisors*, 5 Cal. 3d 771, 780 (1971), *cert. denied*, 405 U.S. 1030 (1972))[2]

Moreover, the Court of Appeal's rationale also violated the equally well-established rule of both appellate review and fundamental fairness that

> "[w]here the record reflects that the trier of fact has not considered a theory under which the evidence is conflicting, the reviewing court cannot rely on that theory to sustain the action of the lower court." (*Zak v. State Farm Mut. Liab. Ins. Co.*, 232 Cal. App. 2d 500, 506 (1965))

The California Supreme Court has repeatedly announced and emphasized that rule too. *E.g.*, *International Aerial Tramway Corp. v. Konrad Doppelmayr & Sohn*, 70 Cal. 2d 400, 406 n.6 (1969); *Healy v. Brewster*, 59 Cal. 2d 455, 464-65 (1963).

The opinion of the Court of Appeal thus creates a new rule of law to the effect that any court, as it feels appropriate, may apply these rules, or not, at its own discretion. The rule must be new, because the court cited no precedent for its action—and none exists. But, despite making new law, the court's lack of publication ensures that no new precedent applicable to anyone else has been created.

The contours of this new rule, as well as the unfairness to Petitioner, are demonstrated by the Court of Appeal's inconsistent application of the *Bogacki* rule even within the four corners of the opinion itself. Its opinion

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[2]In California, an inferior court acts in excess of jurisdiction if it fails to follow binding Supreme Court precedent: Supreme Court authority "must be followed by all the state courts of California." *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962).

declares that Petitioner "failed to raise in the trial court the argument that other uses could be made of Lot 23" and that she therefore waived that argument. App. 13a. Thus, in that instance the court applied the rule *against Petitioner* that a theory not appropriately raised in the trial court is waived.

But, the Court of Appeal itself then turned around and violated and ignored that very same rule by affirming on a theory not raised in the trial court. In effect, the Court of Appeal turned this legal rule on and off like a light switch, with a doctrine that is designed to ensure fairness to all parties instead becoming dependent only upon the party affected.

Second, in *Rubin v. Fuchs*, 1 Cal. 3d 50 (1969), the California Supreme Court held that "neither party can place the other in default unless he is fully able to perform or make a tender of the promised performance." *Id.* at 54-55. In this case, Respondent conceded that he was not able to perform since he never cleared the building on Lot 26, and he never tendered performance to Petitioner. Thus, *Rubin* should have governed disposition of the appeal. Nonetheless, notwithstanding Petitioner's reliance on *Rubin*, nowhere in the Court of Appeal's opinion is *Rubin* even mentioned, much less followed: the court simply ignored it.

Third, in *Hansen v. Covell*, 218 Cal. 622, 631 (1933), the California Supreme Court held that a plaintiff is entitled to pre-judgment interest only insofar as he or she has been damaged during the pre-judgment period. As the Court held, a party

> "is entitled to interest only on such amount of the use of which he has been deprived during the period of default [and] the court may properly allow interest only on the balance found to be due after deduction of such offsets and payments. *The reason is that to that extent only*

has the plaintiff been damaged." (*Id.* at 631 (emphasis added))

The Court of Appeal's recitation of the facts properly recognizes that Respondent was not deprived of the use of Lot 23 during the pre-judgment period after Petitioner's supposed breach of the Agreement. But, even though it correctly recited the facts which compel the application of *Hansen*, the Court of Appeal completely ignored it. Notwithstanding Petitioner's reliance on it, *Hansen*—like *Rubin*—was ignored.

The Court of Appeal's opinion thus resulted in new or changed California procedural and contractual rules that were applied to Petitioner. Because of those new or changed rules, Petitioner sought publication of the opinion pursuant to Rule 978 of the California Rules of Court. Her purpose in seeking publication was to force the Court of Appeal and the California Supreme Court to decide Petitioner's appeal by the same standards those courts would have had to use were the opinion published. In that way, Petitioner sought to make the Court of Appeal accountable for failing to completely consider and justify its holdings under penalty of public criticism and responsibility for upheaval in California procedural and contractual law. In short, Petitioner sought to bring the discipline of the Equal Protection Clause on the appellate process. The effort would not have been necessary at any time prior to the adoption of Rule 977 in 1974.

The effort was in vain. The Court of Appeal recommended that the California Supreme Court deny the request. Petitioner subsequently sought discretionary California Supreme Court review of the Court of Appeal's unpublished opinion, but that request, as well as the request for publication, was denied.

The Court Of Appeal's Development And Application Of New Unprecedented Rules Violates Equal Protection Guarantees.

That its opinion was unpublished conceals the Court of Appeal's sharp departure from and inconsistency with established law. But even more importantly, the lack of publication unconstitutionally deprived Petitioner of any meaningful chance of review by the California Supreme Court which could have corrected the errors, a chance which would otherwise have been much more likely if the opinion had been published as a new precedent.

The California Supreme Court long ago established that its purpose is to decide important legal questions and maintain statewide harmony and uniformity of decision. That Court's focus is thus *not* on correction of error by a Court of Appeal or protection of the rights of the parties in any specific case. *People v. Davis*, 147 Cal. 346 (1905). Accordingly, as one important California treatise has explained,

> "If the court of appeal decision is unpublished, it has no precedential value by definition, and therefore the supreme court will usually deny the petition for review. . . . [I]t is nearly review-proof because it has no precedential value." (2 CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL APPELLATE PRACTICE §22.6, at 960 (3d ed. 1997))

The Court of Appeal's determination that its opinion would not be published thus had several significant practical results. First, had the opinion been published, it would have been recognized as creating new rules applicable to commercial contracts: because of those rules, because of the opinion's effect on California commerce, and because it could then have been cited to other courts as precedent, the California Supreme Court could not have ignored it and review by that Court would have been much more likely.

Second, the Court of Appeal's non-publication order effectively shunted Petitioner onto a separate litigation track, branded her as a second-class litigant, and unconstitutionally deprived her of any realistic opportunity of persuading the California Supreme Court to address the error. The Court of Appeal's non-publication order thus classified Petitioner as a litigant whose further claims to the Supreme Court merited no further review.

Equally important, the unpublished opinion created new law—which applies *only to this Petitioner and to no other person or entity in California.* That is so because Rule 977 of the California Rules of Court prevents reliance on and citation of the opinion, except in very limited circumstances. Thus, the Court of Appeal's opinion resulted in new legal holdings, inconsistent with binding precedent, that applied only to Petitioner. Each of these results violates the fundamental equal protection principle that litigants in similar situations must be treated the same.

In his preface to his first volume of the United States Reports, Supreme Court Reporter William Cranch identified the special importance of publication of opinions that announce new rules of law, so that litigants can structure their affairs and seek to predict the outcome of possible litigation:

> "Even in the same court, analogy of judgment cannot be maintained if its adjudications are suffered to be forgotten. . . . In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a similar case differently, without strong reasons, which, for his own justification,

> he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed." (Preface, 5 U.S. [1 Cranch] (1801))

Justice Stevens has made similar, but more pointed, observations in terming unpublished decisions "secret law" that result in "decisionmaking without the discipline and accountability that the preparation of [published] opinions requires." *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985). As he noted:

> "'In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aides reckonability.'" (*Id.* at 937 n.6 (Stevens, J., dissenting) (quoting K. LLEWELLYN, THE COMMON LAW TRADITION 26 (1960), as quoted in W. Reynolds & W. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1204 (1978)))[3]

Other respected writers have made similar points:

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[3]As Justice Ginsberg also recently pointed out to the youth of our nation on the children's broadcast *Nick News*: "We would have chaos and not the rule of law if each judge in the land did simply what he or she thought was right instead of what the law requires." *Nick News* (Channel 36, San Francisco Area, television rebroadcast, Dec. 27, 1997).

> "When a [] court completely denies public access to judicial opinions, it removes an important check on judicial activity from the legal system. Public availability of judicial opinions helps to hold judges accountable to society for the decisions they reach. Public scrutiny helps to maintain the integrity of the judicial system and assure that individual cases are fairly decided.
>
> "Forcing judicial decisionmaking into the light of day helps not only to assure fairness in fact, but, perhaps as importantly, to promote the appearance of fairness. When a judge's reasoning in a particular case is open to public scrutiny, litigants may be less likely to believe that the decision was arbitrary or unfair. Therefore the public availability of [] opinions promotes judicial accountability, which may also enhance public confidence in the legal system." (K. Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 567 (1997) (footnote omitted))

Precedent, along with the doctrine of *stare decisis*, is the hallmark of our adjudicatory system: if justice is to be dispensed even-handedly, then, of course, similar cases must be decided similarly. Precedent and publication, as William Cranch declared, thus "tends to render the laws certain." Preface, 5 U.S. (1 Cranch).

But, California Rules of Court 976-978 mandate that the rules applied by the Court of Appeal to determine this case apply to this case alone *and also mandate, as a requirement of California law, that they never be brought to the Court of*

Appeals or any other court's attention again, even if the fact situation is exactly the same.[4]

And, equally importantly, the non-publication of the opinion necessarily means that the Court of Appeal *itself is not even bound by the decision in the future*. Because its own

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[4]In Petitioner's view, it is irrelevant to this proceeding whether the law as announced in the Court of Appeal's opinion is in error. This Petition posits *only* that the law announced in the opinion is substantially *different* in material respects from all other judicially declared California law.

It is the possibility of propagation of bad or different law that makes *stare decisis* and the Equal Protection Clause the effective protection of the individual in the court system. It is only because the effects of *stare decisis* and the Equal Protection Clause have been emasculated by Rules 976, 977 and 978 that the California Supreme Court could ignore Petitioner's request for review since, but for those rules, this decision would have the effect of undermining California contractual law. However, having denied Petitioner the equal protection of the law by refusing to publish the case, and refusing to allow it to be cited as precedent to its inferior courts, the California Supreme Court has freed itself to ignore Petitioner's valid pleas for justice as of too little consequence to the community to merit further examination. By non-publication, the California Supreme Court has assured the community that it will never be affected by these rules that nonetheless govern *Petitioner's* affairs. Therefore the community need not examine or debate these rules because the rules will never apply to anyone but Petitioner. There is no complaint from the public at large, and Petitioner's cries can easily be dismissed as "sour grapes."

The California Supreme Court has therefore created a judicial system which *appears* to be operating perfectly and without complaint. But the truth is quite different. Like the portrait of Dorian Gray, the true condition of the quality of the justice system in California continues to decay while the public image is maintained falsely. By summarily cutting off any possibility of propagation of the holdings made in this decision through the device of non-publication, the Supreme Court has cut off all public interest and debate regarding these rules. Such a direct defeat of constitutional purpose surely must raise a federal question which this Court, in its most important role of protector of the constitutional rights of the individual from interference by government "expediency," should feel compelled to review. That no court has yet carefully considered the impact of the combined unpublished opinion and no citation policies on equal protection in this singularly important context should serve to heighten the need for review to a virtual necessity.

non-published decision cannot be cited back to it as precedent in the future, it can proceed as if this decision never existed and, indeed, reach precisely the contrary result the next day on the same set of facts in yet another unpublished decision, without realistic fear of review by any other court!

The California court system therefore made and applied rules *only* to this Petitioner and to no other person or entity. For all practical purposes, it developed an unique model of "selective prospectivity" that not only develops new rules of law, but then says that these new rules will apply *only in this case and not to any other in the future.* Doing so violates the Constitution's guarantee of equal protection:

> "[S]elective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally. . . . 'We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.' . . . For this reason, we abandoned the possibility of selective prospectivity in the criminal context in *Griffith v. Kentucky*, 479 U.S. 314, 328 . . . . Though *Griffith* was held not to dispose of the matter of civil retroactivity . . . *selective prospectivity appears never to have been endorsed in the civil context.*" (*James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537-38 (1991) (emphasis added))

That Rules 976-978 of the California Rules of Court permit such a result ought to be sufficiently odious to merit review even were there no other consequences. But there

are other consequences detailed in legions of critical law review articles.

For example, in their excellent overview of decay in the appellate court system Richman and Reynolds write:

> "The costs of non-publication are not limited to reduced predictability, accountability, responsibility, and reviewability. It should come as no surprise that unpublished dispositions are also dreadful in quality. In a study conducted fifteen years ago, we found that twenty percent of unpublished opinions in nine of eleven circuits failed to satisfy a very undemanding definition of minimum standards, and that sixty percent of the opinions in three circuits failed to meet those standards. There is no reason to think that the situation has improved in the years since. It is no wonder, therefore, that former Chief Judge Markey of the Federal Circuit once told his Circuit Conference that unpublished decisions were 'junk opinions.' One cannot help but ask, however, if the losing litigants thought of their claims as 'junk,' or whether the definition of 'junk' has changed over the years." (W. Richman & W. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem For The Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996))

Reflection upon Justice Stevens' observations of the importance to justice that requires courts to give reasons they are willing to "stand to" in deciding cases (*County of Los Angeles*, 474 U.S. at 937 n.6), demonstrates why California's "No-Publication, No Citation" rules so devastate the quality of appellate justice. That appellate justices should be free to determine even before writing an opinion that the opinion will or will not be marked "Not To Be

Published In The Official Reports" and thereby effectively determine the quality of appellate review particular litigants are to receive should itself be a sufficiently odious offense to the Equal Protection Clause to require Supreme Court review.

Likewise, that appellate courts may continue to wrongly decide similar issues in similar low profile cases for years because their errors are not brought to public attention ought to be sufficiently odious to warrant Supreme Court review.[5]

Perhaps the most bizarre and odious consequence of California's "No Publication-No Citation" rule is that the California appellate courts will allow citation of a first year law student's note in a law review as authority, while prohibiting—indeed at the threat of sanctions—lawyers who dare to cite as precedent a reputedly well considered decision resolving an actual case or controversy involving *an identical or comparable situation*, arrived at by three appellate justices, each appointed by the Governor of California after review by the State Bar of California of his or her intellect, integrity and judicial ability or potential, and who have reputedly each spent sufficient time to thoroughly come to

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[5]The father of the author of this Petition was a prosecuting attorney when a surgery patient died as a result of having been injected with an anesthetic that was erroneously mixed with ether rather than distilled water. This was tragic but accidental. What made the situation so much more tragic was that the hospital pathologist sought to protect the reputation of the hospital and its doctors, and euphemistically reported the cause of death as "therapeutic misadventure." As a result of the pathologist's failure to accurately and completely document his conclusions, three more persons died the next day. California Courts replicate this situation every day. But for the unpublished opinion, the California Rules of Court, a whole host of academics, attorneys, judges, industry representatives, politicians, and journalists would serve to keep judges, and justice on track, and spare future litigants injustice and expense born of avoidable error. In this way, America's most valuable asset, the expectation of justice, would be preserved and protected with the help of the entire community.

understand all aspects of the issues presented in that similar case.

Justice Robert S. Thompson, former Associate Justice of the California Court of Appeal and former President of the Conference of California Judges has noted:

> "An imperfectly reasoned and generally result-oriented opinion may be buried in a non-publication grave. A panel may avoid public heat or appointing authority disapprobation by interring an opinion of real precedential value. More frequently, a panel may make a mistake, and fail to publish an opinion. Selective publication makes the work product of judges less visible." (R. Thompson, *One Judge and No Judge Appellate Decisions* CAL. ST. B.J. (Nov./Dec. 1975))

This non-publication process of the California Rules of Court, along with the results of it that Justice Thompson has noted, has eliminated many of the many equal protection rights the *stare decisis* system guarantees to litigants in American courts. In fact, as is implicit in Justice Thompson's remarks, Rule 976(b) of the California Rules of Court does not compel that *any* opinion of the California Courts of Appeal *ever* be published under any circumstance, even when the content may be of great novelty or importance: publication or non-publication is wholly up to the Court of Appeal, subject to possible Supreme Court contrary decision.

The departure from the centuries old doctrine of *stare decisis* implicit in the non-publication rules has resulted in second-rate decisions and erroneous writing and thinking, as it did in this case. It has permitted California's appellate courts, without realistic fear of California Supreme Court review, to decide cases on an *ad hoc* basis without regard to precedent.

Worse yet, it portends corruption and tyranny. When Rules 976-978 were first adopted twenty-four years ago, very few California decisions were marked "Not To Be Published In The Official Reports." But now, the practice of the California Courts of Appeal is close to uniform non-publication. This transition has been so gradual that very few lawyers, let alone members of the general public, have any idea this destruction of the appellate system of law has taken place. Despite uniform and voluminous criticism in scholarly legal periodicals since the adoption of Rule 977 in 1974, the public press has never taken any note of this desecration of our most important legal right.[6]

For example, the Division of the Court of Appeal that authored the opinion at issue in this Petition has consistently had a rate of publication among the lowest of California's eighteen Divisions or Districts of California's intermediate appellate courts. For example, in 1994-95 (the most recent statistics available), the Division published only 7% of its civil appeals—the second lowest of any appellate court in California—and only 4% of its criminal appeals. CALIFORNIA JUDICIAL COUNCIL, 1996 ANNUAL REPORT 94.[7] Yet, as already noted, for a civil appellant in the California judicial system, receipt of such an unpublished opinion

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[6]How did this offensive on the constitutional rights of litigants advance without detection? Because it was instituted without public debate by the governmental branch charged with being the protector of those rights. A departure from such a fundamental doctrine as *stare decisis* should have required, at the very least, the consent of the People's representatives, the Legislature and the Governor. Had such consent been requested, the public debate would then have determined if the public actually approved of such a vast increase in the discretionary power of the judiciary. It would also have involved discussion of the issue whether *stare decisis* should have been abandoned without any other effective system of quality control for the appellate courts first being instituted.

[7]In 1993-94, the civil figure was 6%, the lowest in the State. CALIFORNIA JUDICIAL COUNCIL, 1995 ANNUAL REPORT 69. In 1992-93, the figure was 10%, the second lowest. CALIFORNIA JUDICIAL COUNCIL, 1994 ANNUAL REPORT 101.

virtually ensures immunity for that opinion, however badly written or error ridden, from review by the California Supreme Court.[8]

Along with the destruction of *stare decisis* has gone any systemic capability for society to correct bad court policy because that bad policy is buried in decisions not generally made available to the public and which no one has reason to read. There remains no incentive for any law professor, law student, academic, industry representative, legislator, governor, journalist or other citizen to take interest in the vast majority of matters adjudicated by the Court of Appeal because these matters are marked "Not To Be Published In The Official Reports" and cannot possibly be used as authority to affect anyone. The appellate court that authored the opinion at issue in this Petition uses non-publication in 930 out of every 1000 civil appeals to shield itself from further review by anyone. Respect for justice compels questions: How much error is perpetuated by this practice? Is any corruption left unrevealed?

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[8]The California Judicial Council does not publish separate statistics of the rate at which the California Supreme Court grants review of published and unpublished Court of Appeal opinions. However, it is common California doctrine that the California Supreme Court very rarely reviews unpublished opinions. As one California treatise explains,

> "Although statistics should not necessarily dissuade parties from petitioning for review, the odds are that most petitions will not be granted. Indeed, the court's willingness to grant review in civil cases seems to be on a declining course (since the late 1980's, significantly fewer civil appeals were granted review than in the preceding decade).
>
> "Moreover, there is little likelihood this declining pattern will reverse itself in upcoming years . . . . Instead of granting review, the supreme court is increasingly invoking its prerogative to *depublish* court of appeal opinions. . . . And, with the court's increasing focus on publication status, the chances of obtaining review seem even slimmer if the court of appeal's decision was *unpublished*." (J. EISENBERG, E. HORVITZ & H. WEINER, CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS §13.18, at 13-4 (1996) (citations omitted))

If a court is not willing to "stand to" a decision as valid precedent for all, that decision should not be made or enforceable.

The Court should take particular note of the opportunity this case presents to restore the discipline of *stare decisis*, without concerns about recognizing decades of unpublished opinions. By recognizing that it is only *present* litigants who are damaged by "No Publication-No Citation" rules, and who thereby are the only persons or entities with standing to raise the issue, the Court can limit its conclusions only to enjoining the enforcement of cases where *res judicata* has not yet attached to the final judgment. The Court thus can correct this problem without unleashing a torrent of past unpublished opinions as precedent.

The Court should therefore grant the petition for a writ of certiorari, and hold that California Rules of Court 976, 977 and 978 have denied Petitioner the equal protection of the law. The Court should either (1) enjoin the California judiciary from enforcing the judgment in this case unless and until the decision is published, thus guaranteeing it precedential value; or (2) remand the matter to the California Court of Appeal for reconsideration and preparation of a decision worthy of publication. The Court should act in order that the constitutional rights of Petitioner, and countless others who are subjected to arbitrary holdings marked "Not To Be Published In The Official Reports" made in jurisdictions with "No Citation" rules, be protected.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: January 12, 1998.

Respectfully,

KENNETH J. SCHMIER
Counsel of Record
1475 Powell Street, Suite 201
Emeryville, CA 94608
Telephone: (510) 652-6086

Attorney for Petitioner
Jeanne B. Schmier

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAVID D. JENNINGS et al.,	B088600
Plaintiffs and Respondents,	(Super. Ct. No. BC013745)
v.	COURT OF APPEAL - SECOND DIST.
JEANNE B. SCHMIER,	FILED Jul 28 1997 Joseph A. Lane Clerk
Defendant and Appellant.	Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Montes, Judge. Affirmed.

Kaplan & Kaplan, Benjamin Elliot Kaplan, Nancy A. Aimola, Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A Professional Corporation, and Richard C. Jacobs for Defendant and Appellant.

Hart & Waters, A Professional Corporation, and Thomas L. Waters for Plaintiffs and Respondents.

The case concerns a failed property trade between the parties. The parties signed an agreement, but reached an impasse when it came time for the trade to occur. The trial court found a breach of contract by one of the parties and awarded damages. We affirm.

FACTS

The parties entered a two-page written agreement in June of 1986 (the Agreement). As indicated in the Agreement, appellant Jeanne Schmier owns an office building located at 2034 Cotner Avenue in Los Angeles (the Cotner Center), as well as Lot 25 in the same tract.[1] Schmier intended to build a parking structure on Lot 25 to provide off-street parking spaces required by the City of Los Angeles for tenants in the Cotner Center. Respondent David Jennings owns the real estate parcels adjacent to Lot 25, and he wanted to acquire Lot 25 for his own purposes, to construct a six-lot commercial project.

The parties agreed to effectuate a land swap whereby Jennings could acquire Lot 25 and Schmier could acquire an unspecified lot belonging to Jennings which would be the same size and configuration as Lot 25 and no more remote than Lot 25. Jennings would eventually designate which of his lots would be traded for Lot 25. The Agreement specifies that "If no lot is designated by Jennings, then Schmier may construct [a parking structure] on Lot 25." If Jennings chose to designate a lot for trade, "Such designated lot would be delivered free and clear of encumbrances and structures and will be graded and paved, however, there shall be no allowance for paving if said paving is waived by Schmier."

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[1]The original parties to the Agreement were David Jennings and Michael Schmier. Michael Schmier was the husband and agent of appellant Jeanne Schmier. Michael Schmier quitclaimed his interest in the Cotner Avenue office building to appellant in June of 1989, and quitclaimed his interest in Lot 25 to her in October of 1990. As used in the opinion, "Schmier" refers to appellant.

Pending Jennings's designation of a lot to exchange for Schmier's Lot 25, Jennings agreed to accept a parking covenant for 14 parking spaces which would allow Schmier's Cotner Center tenants to park on Jennings's Lot 23. It was expressly agreed that Schmier would rescind the parking covenant on Lot 23 within nine months after Jennings designated the lot he was trading for Lot 25. The 14 parking spaces in Lot 23 were provided by Jennings "without any other consideration or fees until the rescission of said covenants or until the nine-month notice period expires or until nine months after the termination of the agreement whichever occurs first." The Agreement, by its own terms, expired five years after June 28, 1986. "If not previously rescinded, Schmier promises to rescind all covenants put on Lot 23 for the benefit of the building at 2034 Cotner Avenue within nine (9) months of the termination of this agreement." With the parking covenant in place on Lot 23, Jennings was precluded from using Lot 23 for any other purpose.

On December 16, 1989, Jennings gave written notice that the land he was designating for the trade was Lot 26. He suggested that Schmier submit plans for a parking structure to be built on Lot 26 as soon as possible, and noted that the parking covenant on Lot 23 had to be removed by Schmier within nine months, per the parties' Agreement. Jennings indicated a willingness to extend for an additional nine-month period—once a construction permit had issued—to allow time to demolish the existing building on Lot 26, which was a two-story, 3,000-square-foot brick structure.

Schmier initially told Jennings that she did not want him to demolish the existing structure on Lot 26; however, this left her with no parking spaces for the Cotner Center. In February of 1990, the parties met to discuss other alternatives, such as putting the parking for the Cotner Center into the project Jennings was planning to build nearby. Jennings made a proposal to this effect through his attorney, but Schmier did not respond to it.

Nine months passed without the land trade taking place. Midway through the nine-month period, Jennings's counsel twice requested confirmation that Schmier intended to proceed the land exchange, in March and April of 1990. Jennings asked Schmier several times to show him her engineering plans to build a parking structure, but Schmier told him she was not going to draw up plans or obtain a construction permit. Without proof of Schmier's construction plans and without assurances that the parking covenant on Lot 23 would be removed, Jennings was unwilling to raze the building on Lot 26.

On September 21, 1990, counsel for Jennings demanded that Schmier remove the parking covenants on Lot 23 and enter into escrow to complete the land trade. He also demanded that Schmier pay rent for the parking spots on Lot 23, and threatened to sue for specific performance if there were further delays. Schmier did not remove the parking covenants nor enter into an escrow to exchange Lot 25 for Lot 26. This lawsuit was then instituted. Further, Jennings constructed barriers on Lot 23 to force the payment of rent to him for use of the parking spaces. This inconvenience caused Schmier's tenants to vacate the Cotner Center.

In mid-1989, Schmier had obtained a loan for $1.1 million from First Professional Bank. The loan was secured by Schmier's Cotner Center building. Schmier did not inform the bank that some of the required parking for the Cotner Center was on Jennings's Lot 23 as a result of the parking covenant, and the bank was unaware of the parking covenant. The parties' side agreement regarding the land swap had never been recorded.

The dispute went to trial in January of 1994. The issues before the court were Jennings's breach of contract, trespass, and interference with contract claims, as well as Jennings's request for injunctive relief and to quiet title and cancel the parking covenant. In addition, the court had to address Schmier's cross-claim for interference with contract, fraud, emotional distress and equitable indemnity. Jennings

asserted that he was damaged by Schmier's refusal to go forward with the land swap contemplated by the Agreement because he was unable to develop his multi-lot project without Schmier's Lot 25 after incurring preparatory costs for his project. In addition, Lot 23 was rendered valueless to Jennings because he was unable to make any use of it with Schmier's parking easement on it. Jennings testified that Lot 23 was worth $336,000.

The trial court gave judgment to Jennings on his complaint, finding that appellant breached the parties' contract by refusing to remove the parking covenant from Lot 23. However, the court noted, the covenant could no longer be removed because of the bank loan Schmier obtained: the court found that the bank was a good faith encumbrancer whose secured interest could not be impaired. The court awarded Jennings damages of $336,000 for his loss of use of Lot 23 as a result of Schmier's breach of the parties' Agreement.

The trial court signed and filed a modified statement of decision on March 18, 1994, after Schmier made objections to the court's earlier statement of decision filed in February. The court subsequently signed and filed a judgment in favor of Jennings on April 26, 1994.

DISCUSSION

Motion To Dismiss

Respondent Jennings has moved to dismiss this appeal. He argues that the appeal is taken from a nonappealable order, and is untimely. He also contends that appellant Schmier has waived her right to appeal.

1. Timeliness and Sufficiency of Notice of Appeal

In her notice of appeal, appellant referred only to the original statement of decision filed in February of 1994, and omitted to mention the April 26 judgment. As respondent observes, a statement of decision is not, by itself, an appealable order. (*Garat v. City of Riverside* (1991)

2 Cal.App.4th 259, 279, disapproved on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, fn.11.) The notice of appeal should have referred to the judgment entered in April rather than to the statement of decision which preceded the judgment. However, this defect in the notice is not fatal to the appeal. When appeal is taken from a nonappealable order which has been superseded by an existing, appealable judgment, the courts have interpreted the notice of appeal as referring to the judgment: "'[A]lthough the notice of appeal incorrectly describes the judgment as a "minute order," and erroneously gives the date of the minute order rather than the date of the judgment, we will treat the appeal as being from the appealable judgment.'" (*Vibert v. Berger* (1966) 64 Cal.2d 65, 68.)

A treatise on appellate procedure states, "[I]f there is an existing appealable judgment, and appellant's error was merely in specifying the wrong document (i.e., a nonappealable preliminary order) in the notice of appeal, the appellate court *should* construe the appeal as being from the judgment. To refuse to exercise this 'saving power' would be hypertechnical and contrary to the policy favoring appellate disposition on the merits." (Eisenberg, Horvitz & Wiener, Cal. Practice Guide, Civil Appeals and Writs (The Rutter Group 1996) § 2:264a.)

Respondent has not attempted to show that he was misled or prejudiced by the erroneous reference in the notice of appeal to the statement of decision rather than to the existing judgment. "'No one was misled. No prejudice to the respondent appears. *Respondent is simply trying to take advantage of a mistake made by appellant . . . . [and] this court should not aid respondent unless compelled to do so by controlling principles of law.*'" (*Vibert v. Berger, supra,* 64 Cal.2d at p.69.) No principle of law requires us to ignore the final judgment that was entered before the notice of appeal was filed. Respondent has made no showing that the notice of appeal was not timely filed following entry of judgment. (Cal. Rules of Court, rule 2.)

2. Waiver of Right to Appeal

Respondent asserts that appellant "has sought and received the benefits of the Judgment in this case and has sued Respondent JENNINGS in another case for failing to comply with the Judgment." Respondent reasons that appellant has waived her right to appeal because she "cannot accept the benefits of a Judgment and at the same time appeal from that Judgment. Such acts are mutually exclusive."

Exhibit 1 to respondent's motion to dismiss shows that on October 19, 1995, appellant sued respondent in a separate action alleging that respondent has damaged appellant by refusing to comply with the trial court's judgment in this case, which requires respondent to give appellant access to the disputed Lot 23 (the enforcement action). Appellant seeks a restraining order and an injunction preventing respondent from interfering with appellant's right to use the parking lot, plus general and punitive damages. Appellant also seeks a judicial declaration that respondent's failure to allow access to the lot "constitutes a waiver of any monetary judgment had under the Judgment" in this action. In response to the enforcement action, respondent claims to have reopened access to parking on Lot 23 to appellant on November 25, 1995. Use of Lot 23 confers a substantial benefit on appellant, who would not otherwise be able to keep her certificate of occupancy for the Cotner Center.

"[A]s a general proposition, one who *accepts* the *benefits* of a judgment cannot thereafter attack the judgment by appeal . . . . 'The right to accept the fruits of a judgment, and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is, therefor[e], a renunciation of the other.'" (*Lee v. Brown* (1976) 18 Cal.3d 110, 114.) No waiver of the right to appeal occurs, however, "in those cases in which appellant is concededly entitled to the accepted benefits, and his right to them is unaffected by the outcome of the case on appeal.

[Citation.] Stated another way, one may appeal from a portion of a severable and independent judgment while accepting the benefits of the unaffected remainder of the judgment." (*Id.* at p. 115; *Gudelj v. Guldelj* (1953) 41 Cal.2d 202, 214.)

In this instance, respondent did not cross-appeal from the portion of the order finding that appellant has a valid encumbrance on respondent's Lot 23 in the form of a parking easement which, in the trial court's opinion, "meets all of the requirements of a covenant running with the land." Although he did not appeal from the finding that appellant has an easement on his land, respondent has attempted to bar appellant from exercising her easement rights by fencing in Lot 23 and preventing appellant's tenants from parking there. This resulted in the lawsuit seeking to enforce appellant's parking rights.

We do not find an inconsistency between the two lawsuits. Appellant is attempting to secure parking for her tenants somewhere near the Cotner Center. The trial court concluded that the parking should be on respondent's Lot 23. Appellant argues on appeal that the parking should be on respondent's Lot 26. While this dispute is being sorted out, it is clear that because of First Professional Bank's secured interest in the Cotner Center, the property cannot be deprived of parking, without which there can be no certificate of occupancy. This appeal will resolve which of respondent's two lots will provide parking for appellant.

Schmier's Appeal

Appellant argues that the trial court "erred when it effectively rewrote the parties' Agreement, forcing Schmier to purchase the covenant on Lot 23." Basically, the court gave appellant parking rights on Lot 23 in perpetuity for the sum of $336,000. Appellant argues in her brief that the parties never contemplated such an arrangement. Rather, appellant's parking on Lot 23 was supposed to be temporary, and she was supposed to obtain (through the land swap) permanent parking on Lot 26, another property

owned by respondent which is closer to appellant's office building. The obstacle which prevented this trade from occurring was, according to appellant, Jennings's failure to perform certain conditions precedent; specifically, he failed to demolish the building on Lot 26, grade and pave Lot 26, and complete the exchange.

Appellant maintains that the correct result would have obtained had the trial court read the Agreement as a whole and given effect to the parties' mutual intentions. (Civ. Code, §§ 1636, 1641.)

One of the main problems the parties encountered is that the Agreement does not specify which of them is responsible for opening escrow to effectuate the actual exchange of Lot 25 for Lot 26. Nor does the Agreement specify a time frame during which escrow must be opened. From the testimony, it appears that the concept of opening escrow was never discussed during the meetings between the parties. What is clear is that the Agreement states unequivocally that Schmier must rescind all covenants on Lot 23 within nine months after Jennings designates a particular lot to trade for Lot 25. Because of the nine-month time frame designated in the Agreement, the onus was on Schmier to take all necessary measures to either find alternative paid parking in the vicinity or start escrow to speed through the exchange and ensure parking on Lot 26.

Although there was an existing building on Lot 26, the Agreement mandates that Jennings deliver the lot free of any structures. The Agreement does not require that Jennings clear and grade Lot 26 immediately upon designating it as the exchange lot. Nor does the Agreement require that Jennings clear the lot before escrow could be opened; rather, he had to clear and grade it before *delivery* upon the close of escrow. Because no escrow or other formal mechanism for completing the trade had started, Jennings was under no obligation to demolish the existing building.

There is no evidence that Jennings was attempting to "unilaterally withdraw from the contract," as Schmier argues. If Jennings did not want to go through with the land swap, all he had to do was not designate an exchange lot. In this scenario, the Agreement would simply terminate automatically in five years without an exchange taking place. Having designated an exchange lot, Jennings evinced an intent to go forward, not an intent to withdraw from the contract. After evincing this intent to proceed, however, Jennings was not compelled to start escrow within a set period of time because none was specified in the Agreement. The only real deadline Jennings faced was completing the exchange before the Agreement expired in 1991.

There was no requirement in the Agreement that the exchange occur within nine months. There is no testimony to support a finding that the parties intended to complete the swap within nine months. The only event that had to happen within nine months under the Agreement was Schmier's removal of the parking covenant on Lot 23. The Agreement states that within the nine months, Schmier (1) could build a parking structure *or* (2) she could find "other parking" at some unspecified location of her choosing. Because the swap did not occur within nine months, which prevented appellant from building a parking structure, appellant had to find "other parking." By contrast, the parking covenant on Schmier's Lot 25 did not have to be removed during the nine-month period: the parking covenant rescission on Lot 25 would occur "when an exchange is effected."[2] Clearly, this language acknowledges the possibility that no exchange would occur within nine months.

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[2]There was a parking covenant on Schmier's Lot 25 to ensure adequate parking for the Cotner Center. This apparently was a condition of the city permit allowing Schmier to convert the Cotner Center from a warehouse into an office building.

For these reasons, the trial court correctly determined that Schmier breached the parties' Agreement when she refused to rescind the parking covenant on Lot 23 within nine months after Jennings designated Lot 26 for the property swap. Although Schmier blames Jennings for the parties' failure to open escrow, the Agreement does not impose any special burden on Jennings to take the initiative. Instead, the Agreement places a special burden on Schmier by requiring her to give up her parking rights on Lot 23 within nine months. If ever there was an incentive to move forward with alacrity, this was it. Yet Schmier chose to do nothing: she neither started escrow nor found other parking for her tenants in the vicinity. Then, she refused to rescind the parking covenant, as expressly required by the Agreement, which prevented Jennings from building the commercial project he had planned for Lot 23.

Even after breaching the contract, Schmier made no demonstration that she was willing or able to complete the land swap by opening escrow and showing her good faith development of plans to construct a parking structure on Lot 26. During the nine-month period, and after the nine months expired, Jennings repeatedly demanded performance by Schmier or assurances of her performance. No performance or assurances were forthcoming.

Appellant's breach of a material term of the Agreement, coupled with her lack of assurances of future satisfactory performance, was sufficient to excuse Jennings's continued performance under the Agreement. Although Schmier did not expressly repudiate the Agreement, her conduct justified Jennings's belief that future performance was either unlikely or would take place at Schmier's convenience. (See *Asso. Lathing etc. Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal. App.2d 40, 51.) Jennings could not put his own development plans on hold indefinitely while Schmier blocked his use of Lot 23. "Plaintiffs were not required to endure that uncertainty or to await that convenience and were therefore justified in treating

defendants' nonperformance as a total breach of the contract." (*Ibid.*)

Appellant argues that the trial court impermissibly rewrote the parties' Agreement by awarding damages of $336,000 because the Agreement did not allow for this. Appellant does not seem to understand that once she breached the Agreement, all bets were off. Jennings was entitled to elect his remedies, including rescission and restitution, damages, specific performance, ejectment or quiet title. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 797, p. 720.) In his amended complaint, Jennings sought damages for the breach.

The reason the trial court forced Schmier to "buy" the 14 parking spaces in Lot 23 was because Schmier encumbered the Cotner Center in 1989 with a $1.1 million mortgage without disclosing the temporary nature of the parking covenant to the lender. The court had already found that the lender was a good faith encumbrancer; therefore, the bank's interest in the property could not be compromised by extinguishing the parking covenant on Lot 23. Without the parking, the office building would lose its certificate of occupancy and be worthless as a commercial enterprise. The result the court arrived at both protected the lender's secured interest by ensuring parking for the Cotner Center *and* compensated Jennings for his loss of the use of Lot 23. The court could not order that the property swap contemplated by the Agreement take place because Jennings did not sue for specific performance: the court could not order implementation of a remedy not sought or desired by the plaintiff. If Schmier really wanted Lot 26, she should have taken steps to open escrow and effectuate the trade as rapidly as possible. Instead, she sat on her rights under the Agreement and disregarded her responsibilities under that instrument.[3]

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[3]If appellant had any doubts about the construction of the Agreement and the obligations it imposed, she should have brought an action for

(continued...)

Schmier maintains that the damages awarded were too high. Jennings—as the owner of the property—testified that Lot 23 was worth $336,000 with the parking covenant, and $425,000 without the parking covenant, a difference of $89,000. He also testified that the parking covenant precluded him from making any other use of Lot 23. The court awarded him $336,000. Nevertheless, Schmier asserts that Jennings still owns the lot and can make other uses of it, subject only to the parking covenant. Therefore, she reasons, he is only entitled to $89,000, which is the difference in value between the land with the covenant and the land without the covenant.

As respondent points out, appellant failed to raise in the trial court the argument that other uses could be made of Lot 23, including its "air and mineral rights." Thus, the argument is waived and cannot be considered on appeal. In any event, there is no evidence proving what those other uses might be or how they might reduce Jennings's loss to only $89,000.

The trial court awarded prejudgment interest to Jennings at the rate of 10 percent per annum from September 16, 1990 to April 26, 1994. This amounted to $121,613. The court relied on Civil Code section 3289, subdivision (b), which states, in relevant part, that an obligation under a contract entered into after January 1, 1986, accrues interest at a rate of 10 percent per annum "after a breach." The court concluded that the contract was breached on September 16, 1990, because the parking covenant on Lot 23 had to be removed by that date pursuant to the Agreement.

Appellant asserts that prejudgment interest was improper because respondent restricted her access to Lot 23 by constructing barricades to compel the payment of rent.

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[3](...continued)
declaratory relief rather than simply ignoring the Agreement's obligation to remove the parking covenant within nine months.

However, once appellant breached the Agreement by failing to remove the parking covenant, respondent was not under an obligation to continue providing free parking for appellant's tenants on his Lot 23. Moreover, with the recorded covenant clouding his title, respondent could not build his planned six-parcel commercial project on Lot 23. The trial court did not abuse its discretion by awarding prejudgment interest under the circumstances.

Finally, appellant claims that the trial court erred by failing to award damages on her cross-complaint. As we have found, appellant was the party who breached the Agreement; therefore, she is not entitled to recover damages for her wrongdoing.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

FUKUTO, J. NOTT, J.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 08/27/97

Haward, Rice Nemerovski & Canady
Richard C. Jacobs
Three Embarcadero Center
7th Flr
San Francisco, CA. 94111

RE: Jennings, David D.
VS.
Schmier, Jeanne B.
2 Civil B088600
Los Angeles NO. BC013745

THE COURT:

APPELLANTS PETITION FOR REHEARING DENIED.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 08/27/97

Haward, Rice Nemerovski & Canady
Richard C. Jacobs
Three Embarcadero Center
7th Flr
San Francisco, CA. 94111

RE: Jennings, David D.
vs.
Schmier, Jeanne B.
2 Civil B088600
Los Angeles NO. BC013745

THE COURT:

RESPONDENTS PETITION FOR REHEARING DENIED.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MEMORANDUM

TO: THE SUPREME COURT OF THE STATE OF CALIFORNIA

FROM: ROGER W. BOREN, Presiding Justice
MORIO L. FUKUTO, Associate Justice
MICHAEL G. NOTT, Associate Justice

DATE: September 26, 1997

RE: Compliance with Rule 978(a), California Rules of Court, *Jennings v. Schmier*; B088600; Filed July 28, 1997

Attached hereto is a copy of the typewritten opinion in the above case, not certified for publication. Also attached is a copy of a letter from Richard C. Jacobs of Howard Rice Nemerovski Canady Falk & Rabkin, attorneys for Defendant and Appellant, dated September 24, 1997, requesting publication of the opinion.

It is the view of this court that the issues involved are not such that the opinion meets the criteria for publication specified in rule 976. This was the original view

of the members of the panel participating in the opinion and after reexamination and reconsideration of the matter of publication, we still consider the decision to be valid. Therefore, pursuant to rule 978(a), this court is referring this matter to the Supreme Court in the above context.

Attachment

cc: All Parties

Second Appellate District, Division Two, No. B088600
S064159

IN THE SUPREME COURT OF CALIFORNIA

DAVID D. JENNINGS Et Al.,
Respondents

v.

JEANNE B. SCHMIER,
Appellant

SUPREME COURT
FILED
OCT 15 1997

Robert Wandruff Clerk

DEPUTY

Appellant's petition for review DENIED.
The request for an order directing publication of the opinion is denied.

GEORGE
Chief Justice